SUPREME COURT, U. S.
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No. 612

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS W. MCARTHUR, ET AL., PETITIONERS

v.

CLARK CLIFFORD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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1. Petitioners, who are now serving in Viet Nam, are members of an Army reserve unit ordered to active duty under Section 101(e), P. L. 89-687. In challenging the validity of their call to active duty, they contend, *inter alia*, that P. L. 89-687 is an unconstitutional delegation of legislative power to the executive and impairs their enlistment contracts, and that they may not be sent to fight in an undeclared war in Viet Nam.

In the courts below, petitioners sought injunctive relief, or alternatively, a writ of habeas corpus. The district court denied the requested relief on the merits, and also refused to stay the military orders assigning petitioners to Viet Nam (Pet. App. 2A). Circuit Judge Butzner on September 25, 1968, refused to stay petitioners' military orders pending appeal (Pet. App. 1A). Petitioners then sought a stay from this Court of the military orders assigning them to Viet Nam which was denied by the Chief Justice on September 26, 1968, and denied by the full Court on October 8, 1968. In conjunction with their stay application to this Court, petitioners on October 7, 1968, filed the present petition for certiorari. After the Court of Appeals for the Fourth Circuit acted on the merits of the appeal of the district court's decision, and affirmed the district court's action denying any relief to them, petitioners filed an *Addendum* to their petition for certiorari to seek review of that action.

2. The reserve unit to which petitioners belong was called to active duty pursuant to Section 101(e) of P. L. 89-687, which provides:

> Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.

This statute does not unconstitutionally delegate legislative power to the President, nor lack adequate

standards. The authority given to the President [1] to order reserve units to active duty "when he deems it necessary" involves the exercise of his broad authority as Commander-in-Chief to determine whether the national security requires an increase in the size of the armed forces. Cf. *Bowles* v. *Willingham*, 321 U.S. 503; *Yakus* v. *United States*, 321 U.S. 414. Moreover, since the President is acting in that capacity rather than exercising legislative authority delegated by Congress, the statute presents no problem under the separation-of-powers doctrine.

P. L. 89-687 does not impair the obligations of petitioners' enlistment contracts. As petitioners note (Pet. 5), paragraph 53 of those contracts provides that they may be ordered to active duty "in time of war or National emergency declared by Congress, *or when otherwise authorized by law*" (emphasis added). P. L. 89-687 is a law which "authorized" their call to active duty. Moreover, all applicable statutes in effect at the time when petitioners signed their enlistment agreements must be considered as incorporated therein by reference. See, *e.g.*, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 435. Among the statutes in effect at the time they enlisted was 10 U.S.C. 673, which provides that "[i]n time of national emergency declared by the President after January 1, 1953, *or when otherwise authorized by law*" the Secretary of Defense may "without the consent of the persons concerned, order any unit * * * in the Ready Re-

[1] He in turn has delegated this power to the Secretary of Defense and the latter to the Secretaries of the Army, Navy and Air Force.

serve * * * to active duty * * * for not more than 24 consecutive months" (emphasis added). P. L. 89-687 is exactly such a "law" as is contemplated by 10 U.S.C. 673. See *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, October Term, 1968, No. 263 Misc., October 14, 1968. Thus, the calling of petitioners to active duty pursuant to P. L. 89-687 did not violate their enlistment contracts.

3. Petitioners also contend that their being sent to fight an undeclared war in Viet Nam violates the Constitutional provision that only Congress can declare war. However, the questions which petitioners seek to raise are "political questions", and "are plainly the exclusive province of Congress and the Executive." *Luftig* v. *McNamara*, 373 F. 2d 664-665, 666 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934. Petitioners are asking judicial intervention in the Executive's conduct of foreign policy. As this Court said in *Johnsen* v. *Eisentrager*, 339 U.S. 763, 789:

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

4. Petitioners' remaining arguments are also untenable. Section 101(d) of P. L. 89-687 provides that "[i]n order to achieve fair treatment as between members in the Ready Reserve who are being considered

for active duty under this section, appropriate consideration shall be given to * * * family responsibilities * * *." It is clear from the statutory framework that this section only applies to the call-up of individual reservists under Sections 101(a) and 101(b) of P. L. 89-687. Family responsibilities are obviously not an "appropriate consideration" in determining which reserve *units* to order to active duty under Section 101(e).

The argument that the Military Selective Service Act of 1967, P. L. 90-40, 81 Stat. 100, repealed P. L. 89-687 is frivolous. P. L. 90-40 merely codified certain portions of P. L. 89-687 as 10 U.S.C. 673a, and did not affect the remainder of P. L. 89-687. See 81 Stat. 105.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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